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IN THE

Supreme Court of the United States

October Term, 1988

ARTHUR DITMAR,

Petitioner,

v.

NEEDHAM HARPER WORLDWIDE, INC.,
and
ANHEUSER-BUSCH, INC.,

Respondents.

OPPOSITION OF RESPONDENTS NEEDHAM HARPER WORLDWIDE, INC. (NOW KNOWN AS DDB NEEDHAM WORLDWIDE, INC.) TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION RESTATED

Whether the allegation that Needham Harper Worldwide, Inc. falsely stated that Arthur Ditmar threw a single home run pitch while he was a professional baseball player in 1960 states a claim for defamation *per se*, when the complained of statement was made more than twenty years after Ditmar had retired from professional baseball?

STATEMENT REQUIRED BY RULE 28.1

Respondent Needham Harper Worldwide, Inc. ("Needham"), which has changed its name to DDB Needham Worldwide, Inc., is a wholly-owned subsidiary of Ommicom Group, Inc. Ommicom Group has no parent company. In addition, BBDO Worldwide is a wholly-owned subsidiary of Ommicom Group.

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REASONS FOR DENYING THE WRIT

Petitioner seeks review of the Sixth Circuit's holding that the District Court properly dismissed his amended complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state any claim against Needham upon which relief can be granted. Petitioner's claim in the District Court was one for defamation. The Sixth Circuit's holding is simply a correct application of well-settled principles of law to the unique facts of this case.

1. Petitioner, a former major league baseball player and currently a municipal recreation and athletic director, sought recovery of general and punitive (but not special) damages against Needham and Anheuser-Busch, Inc. based upon the broadcast of a Needham-produced Budweiser beer television commercial in the fall of 1985. The commercial included the original live play-by-play radio broadcast of the ninth inning of the seventh game of the 1960 New York Yankees-Pittsburgh Pirates World Series. The original radio broadcast mistakenly made one reference to Petitioner as throwing a pitch for the Yankees in the bottom of the ninth inning when the Pirates' Bill Mazeroski hit a home run. In fact, the Yankees' pitcher was Petitioner's teammate Ralph

Terry. Petitioner claims that the use of the authentic radio broadcast in the commercial defamed him because it damaged his reputation as a former major league pitcher.

On June 25, 1987, the District Court issued its order and opinion granting Needham's motion to dismiss Petitioner's amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). The District Court found, as a matter of law, that Petitioner had not pled any special damages (and necessarily therefore found that no claim for defamation *per quod* had been stated) and that he had failed to state any claim for defamation *per se.*

Petitioner then appealed the District Court's dismissal order to the Sixth Circuit Court of Appeals. The Sixth Circuit affirmed that order from the bench after oral argument without a written opinion. The Sixth Circuit also held that two additional claims raised by Petitioner for the first time on appeal—a false light invasion of privacy claim (raised for the first time in his appellate reply brief) and an intentional infliction of emotional distress claim (raised for the first time in his appellate oral argument)—were not timely raised. In addition, the Sixth Circuit held that the false light claim was not even cognizable under Ohio law.

2. The undisputed facts precluded Petitioner from stating a defamation claim under well-settled principles of applicable Ohio defamation law. Because Petitioner alleged no special damages, his claim was actionable only if it constituted one for defamation *per se. See, e.g., Becker* v. *Toulmin,* 165 Ohio St. 549, 557, 138 N.E.2d 391, 398 (1956). The determination of whether a statement is defamatory *per se* was a question of law for the District Court to decide. *E.g., Becker* v. *Toulmin, supra,* 165 Ohio St. at 554, 138 N.E.2d at 395-96. As the District Court properly found, the broadcast could not give rise to a claim for either (1) injury caused by holding one up to public ridicule or contempt or (2) for injury to one's reputation—the only two types of reputational

injury which can support a claim for defamation *per se* under Ohio law. *See Motley* v. *Gombos,* 78 Ohio L. Abs. 546, 548, 153 N.E.2d 465, 466 (1958). As to the former, the charge of throwing a home run pitch falls far short of holding Petitioner up to the sort of public ridicule or contempt for which defamation law provides redress because it does not impute criminal or immoral conduct, which is necessary to reach the level of public ridicule or contempt which constitutes defamation. *E.g., McCarthy* v. *Cincinnati Enquirer, Inc.,* 101 Ohio App. 297, 302, 136 N.E.2d 393, 397 (1956). And the charge could not injure Ditmar's professional reputation as a major league ballplayer since he long ago retired from the profession. *E.g., Motley* v. *Gombos, supra,* 78 Ohio L. Abs. at 548, 153 N.E.2d 465, 467. Moreover, Petitioner failed to state a claim for defamation *per se* for yet another reason advanced by Needham, which although not expressly relied upon by the District Court is subsumed in its analysis. That is, it is well-settled that a charge of a single mistake, if throwing a single home run pitch is a mistake at all, cannot support a claim of *per se* defamation. *Motley, supra,* 78 Ohio L. Abs at 548, 153 N.E.2d at 467.

In sum, Ditmar's defamation claim was properly dismissed.

3. The Sixth Circuit also properly rejected Petitioner's invasion of privacy and intentional infliction of emotional distress claims as being untimely. As stated, the privacy claim was first raised in Petitioner's appellate reply brief and the latter was not raised until his appellate oral argument. "It is, of course, axiomatic that an appeals court will not consider an argument not presented to the trial court." *Seegull Manufacturing Co.* v. *NLRB,* 741 F.2d 882, 886 (6th Cir. 1984). *Accord In re Butcher,* 829 F.2d 596, 601 (6th Cir. 1987); *Wright* v. *Holbrook,* 794 F.2d 1152, 1156 (6th Cir. 1986); *Howard* v. *Pierce,* 738 F.2d 722, 723 (6th Cir. 1984). In addition, the false light claim was properly rejected by the Sixth Circuit because it is not even a cognizable claim under Ohio law. *Angelotta* v. *American Broadcasting Corp.,* 820 F.2d 806,

809 (6th Cir. 1987). Petitioner's continued attempt to assert these new claims should be similarly rejected by this Court.

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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